APPENDIX A

[Publ In Full—Filed March 19, 1997]

No. 2-96-0769

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

KLEINSCHMIDT INC.; BANK OF WAUKEGAN, as Trustee; and HARRY S. GAPLES,

Plaintiffs-Appellants,

v.

THE COUNTY OF COOK; THE COUNTY OF LAKE; AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Trustee; and CORPORATE 500 CENTRE PHASE 1,

Defendants-Appellees.

Appeal from the Circuit Court of Lake County, No. 95-CH-501.
Honorable Peter M. Trobe, Judge Presiding.

JUSTICE THOMAS delivered the opinion of the court:

The plaintiffs, Kleinschmidt Inc. (Kleinschmidt), Bank of Waukegan, as trustee under a trust agreement dated November 20, 1986, and known as trust No. 1898, and Harry Gaples, filed this declaratory judgment action against the defendants, the County of Cook (Cook County or the County), the County of Lake, American Nation-

al Bank and Trust Company of Chicago, as trustee under an agreement dated August 31, 1983, and known as trust No. 59087, and Corporate 500 Centre Phase 1 (Corporate 500), seeking to set aside a conveyance of land to the County as an unconstitutional taking. After the parties filed cross-motions for summary judgment, the trial court granted the defendants' motions for summary judgment. The plaintiffs appeal.

The record reveals that in 1985 Kleinschmidt was a division of SCM Corporation, which owned the beneficial interest in a tract of land that had 276 feet of frontage on the north side of Lake Cook Road east of the Milwaukee/Soo Line railroad tracks. The property was on the Lake County side of the road and was improved with Kleinschmidt's industrial building. The south 276 feet of the frontage was unimproved. Harry Gaples, president of Kleinschmidt, eventually purchased Kleinschmidt and the land in question from SCM Corporation.

In September 1985, Cook County adopted a resolution which authorized improvement of Lake Cook Road. The project consisted of expanding the street and creating a highway underpass at the railroad tracks east of the plaintiffs' property. Between the plaintiffs' property and the railroad tracks to the west was a 37 acre tract of land owned by a land trust in which defendant Corporate 500 held the beneficial interest. The proposed project called for the elimination of Corporate 500's access road off of Lake Cook Road to the Corporate 500 property. Cook County informed the plaintiffs that since Corporate 500's Lake Cook Road entrance was being eliminated as a result of the project, it would be necessary to construct an access road to the east, across the vacant front portion of the plaintiffs' property. In November and Decem-

ber 1985, Cook County requested the plaintiffs' permission to survey their property for the project. The plaintiffs refused to allow the survey at that time.

On January 18, 1986, Corporate 500 wrote Cook County a letter offering to convey certain easements necessary to complete the project in exchange for acquiring a portion of the plaintiffs' land to build and landscape a new Lake Cook access road. In spring 1986, Corporate 500 offered to buy a portion of the plaintiffs' property to construct the access road. On August 22, 1986, the County was informed that the plaintiffs were unwilling to sell a portion of their property to Corporate 500.

In October 1986, the plaintiffs eventually allowed their land to be surveyed by the County. In August 1987, an acquisition plat was prepared. The parcel to be taken consisted of approximately 38,422 square feet and followed a curvilinear line from the northern most portion of the property running in a southeasterly direction to Lake Cook Road. This plat left part of the plaintiffs' front grass. Gaples, however, did not want to be left with an irregular shaped remainder so he requested that the County acquire a rectangular shaped parcel that ran straight easterly from the northern most portion of the tract. Pursuant to Gaples' request, Cook County prepared a second plat that conformed to a rectangular configuration. The legal description for the taking of this revised parcel consisted of 59,931 square feet and was referred to as scheme B.

On July 3, 1989, Cook County passed a resolution describing a portion of the plaintiffs' property, tract 21-04, as property "to be taken," noting that it was necessary for the construction of a highway improvement and di-

recting that an agreement be attempted with the owner for the purchase of the property. The resolution further provided that if an agreement could not be reached, then proceedings should be initiated under the eminent domain provisions of the Code of Civil Procedure (735 ILCS 5/7-101 *et seq.* (West 1994)) to determine the amount of compensation to be paid. A negotiation meeting was set for September 12, 1989. On August 25, 1989, Cook County sent the plaintiffs a letter listing the agenda for the meeting. Among the items listed to be discussed at the meeting were "[t]ender of offer for the required right of way" and the "condemnation option."

On September 12, 1989, the County offered Gaples $575,000 for the property. Thereafter, Gaples submitted a counteroffer of $615,000. The parties eventually agreed to a purchase price of $600,000. The closing took place in December 1989, with funds for the purchase coming from the Illinois Motor Fuel Tax fund. To obtain a real estate tax exemption for the property, the Cook County State's Attorney's office filed an affidavit stating that the property was acquired in lieu of condemnation for construction of a roadway improvement.

After the acquisition of a portion of the plaintiffs' land, the project was delayed and had not begun by 1994. At that time, Cook County was negotiating with Corporate 500 about the acquisition of Corporate 500's entrance from Lake Cook Road immediately west of the portion conveyed by the plaintiffs to Cook County. Corporate 500 was making a claim for damage to the remainder of its property in addition to a claim for the portion of its property the County actually sought for its project.

On July 7, 1994, Cook County and Corporate 500 entered into an agreement in which the County agreed to pay Corporate 500 $312,000 for its land. The County also agreed to convey a portion of tract 21-04 to Corporate 500. Pursuant to the agreement, the County was required to construct the access road and install the necessary signs. The County was also required to perform certain landscaping work in the area surrounding the access road. The plaintiffs learned of the agreement when Corporate 500 applied to the Village of Deerfield for construction permits to landscape and erect fences on the property, asserting the agreement as its title to the property.

On June 20, 1995, the plaintiffs filed their complaint, seeking a declaration that the contract for the conveyance of a portion of tract 21-04 to Corporate 500 was illegal on the grounds that the plaintiffs had conveyed the property to the County under the threat of condemnation thereby exercising the constitutional right of eminent domain, making it constitutionally impermissible for the County to subsequently convey the land to a private party such as Corporate 500. The defendants filed motions for summary judgment on the ground that a constitutional "taking" did not occur since the plaintiffs voluntarily conveyed their property to the County and a petition for condemnation was not filed. The plaintiffs filed a cross-motion for summary judgment. The trial court granted the defendants' motions for summary judgment and denied the plaintiffs' cross-motion on the ground that, where the interested parties agree to an amount of compensation and no condemnation petition is filed, no taking occurs.

On appeal, the plaintiffs argue that its conveyance of tract 21-04 to the County constituted a "taking" in the constitutional sense which rendered the County's subsequent conveyance of a portion of that tract to Corporate 500 violative of the requirement that land taken be devoted to a "public use."

Summary judgment is proper when the pleadings, depositions, and affidavits on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 1994). As a court reviewing the propriety of an order granting summary judgment, we conduct a *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

In granting the defendants' motions for summary judgment, the trial court relied primarily on *Patrick Media Group, Inc. v. Du Page Water Comm'n*, 258 Ill. App. 3d 1068 (1994). In *Patrick*, the commission needed part of the B&O Railroad's land to complete its project to supply Lake Michigan drinking water to the residents of Du Page County. The commission began negotiations with the railroad for purchase of the land. At that time, Patrick Media Group (PMG) had lease agreements with the railroad which allowed it to maintain three billboards on the property. The leases provided that they were subject to termination upon one month's notice by either party. The commission eventually made and the railroad eventually accepted a written purchase offer with the conveyance subject to the existing leases on the property. After the purchase was consummated, the commission terminated PMG's leases. Thereafter, PMG filed suit against the commission contending that its acquisi-

tion of the property was a "taking" requiring the payment of just compensation.

In deciding the issue of whether the commission's acquisition of the property from the railroad by means of a purchase agreement rather than a condemnation proceeding constituted a taking, the court noted:

> "[T]he eminent domain act provides for the taking of property where 'the compensation to be paid *** cannot be agreed upon by the parties interested.' [Citation.] What necessarily follows from this is that, *where the interested parties do agree to an amount of compensation, no taking of property by the government occurs.* (Emphasis added.) Indeed, it is generally agreed by the courts of this State that, under the act, the exercise of the right or power of eminent domain by an authority seeking to appropriate private property may not occur *until* the authority has first attempted to reach an agreement with the owner on the amount of compensation. (Emphasis in original.) [Citations.] In *Department of Transportation v. Walker* (1980), 80 Ill. App. 3d 1039, 400 N.E.2d 956, the court stated that 'an attempt at agreement must be both bona fide and made in good faith by the acquiring authority *before the condemnation proceedings may be initiated.*' (Emphasis added.) [Citation.] We find it significant that our supreme court in *Harrison-Halsted* characterized the acquiring authority and property owner as 'contracting parties' in the negotiation stages of their relationship and as 'antagonists' only once a failure to agree upon compensation had become evident and it became necessary for the parties to go to court." *Patrick Media Group, Inc.*, 258 Ill. App. 3d at 1075-76.

The plaintiffs argue that *Patrick* is distinguishable from the present case because in *Patrick* there was no

threat of condemnation while in the present case the County had passed a resolution stating that the plaintiffs' property was to be taken by reaching an agreement for its sale and, if no agreement could be reached, then by eminent domain proceedings.

Despite the plaintiffs' assertions, we do not find *Patrick* to be distinguishable so as to preclude its application to the facts of the case at bar. In that regard, we recognize that the *Patrick* court did respond to the plaintiffs' reliance on the out-of-state authority of *Lanning v. City of Monterey,* 181 Cal. App. 3d 352, 226 Cal. Rptr. 258 (1986), by noting that in *Lanning* the city and railroad expressly agreed in their purchase contract that the acquisition of the property was the essential equivalent of the city's exercise of its power of eminent domain, while in the case before it there was no threat of a condemnation proceeding. However, we do not find the *Patrick* court's discussion of *Lanning* to detract from its finding that, where parties agree to compensation so as to forestall a condemnation proceeding, no taking occurs. *Patrick Media Group, Inc.,* 258 Ill. App. 3d at 1075.

The taking of property in the constitutional sense is accomplished only by the filing of a petition, the ascertainment of value, and the payment of just compensation. *Towne v. Town of Libertyville,* 190 Ill. App. 3d 563, 568 (1989); *Citizens Utilities Co. v. Metropolitan Sanitary District of Greater Chicago,* 25 Ill. App. 3d 252, 255 (1974). As the courts in *Patrick* and *City of Chicago v. Harrison-Halsted Building Corp.,* 11 Ill. 2d 431 (1957), noted, the parties are considered contracting parties in the negotiation stages of their relationship and as antagonists only after the parties have failed to agree upon compensation and are forced to go to court for condemna-

tion proceedings. *Patrick Media Group, Inc.*, 258 Ill. App. 3d at 1076; *Harrison-Halsted Building Corp.*, 11 Ill. 2d at 434. This is consistent with the statute which provides for a taking of property where the compensation cannot be agreed upon by the interested parties. See 735 ILCS 5/7-102 (West 1994).

In *Mattion v. Trustees of Schools of Township 41*, 2 Ill. App. 3d 1035 (1971), the defendant school board adopted a resolution to condemn property owned by the plaintiffs. After the parties were unable to agree on compensation, the school board filed a petition for condemnation. During the pendency of the condemnation suit, the parties agreed on a purchase price, and the plaintiffs thereafter executed a warranty deed conveying the land to the school board. Five years later, the school board sold the land to a private party. The plaintiffs filed suit, alleging that the defendant wrongfully used its power of eminent domain to coerce the plaintiffs to execute a warranty deed for the land. In finding that the land in question was not acquired through condemnation proceedings, the court noted that the plaintiffs were not coerced into selling the property. *Mattion,* 2 Ill. App. 3d at 1039. We find *Mattion* instructive because it stands for the proposition that a threat of condemnation does not amount to coercion which would serve to vitiate the instant purchase contract between the plaintiffs and Cook County.

A similar result was reached in *Mills v. Forest Preserve District,* 345 Ill. 503 (1931). There, the plaintiff agreed to sell his property to the defendant district when the district threatened to commence condemnation proceedings to acquire the property. Two years later, the district accepted the plaintiff's offer to sell the land for $600 per acre. The contract offer made by the plaintiff

noted that "[t]his is a compromise offer made to avoid litigation." The plaintiff later filed suit against the district, alleging that it illegally took his land and that he entered the agreement under duress and the threat of condemnation. Despite the fact that the district did not even possess the authority to condemn the land in question, our supreme court found that there was no duress or coercion. The court refused to rescind the deed and held that the plaintiff "got what he bargained for, and he cannot, under guise of the protection of public interest, rue his bargain. He has no private interest in the subject matter." *Mills*, 345 Ill. at 518. In both *Mills* and the present case, the property owners voluntarily negotiated a purchase price, consummated their deal, and received the benefit of their bargain.

In support of their position that there was a taking of property in the case *sub judice*, the plaintiffs rely on certain language from *Griffin v. City of North Chicago*, 112 Ill. App. 901 (1983). There, Griffin owned a parcel of land situated in the City of North Chicago and designated by the forest preserve district for acquisition pursuant to a 1975 resolution of the forest preserve. After negotiations, Griffin and the forest preserve entered into a contract for the purchase of the property. The contract contained a rider subjecting the deal to the approval of the City of North Chicago as required by a newly passed amendment to a state statute. The amendment provided that the forest preserve could not condemn *or purchase* property without the approval of the city. When the city failed to consent to the purchase, the forest preserve and Griffin filed suit seeking a declaration that the amendment was inapplicable.

The court in *Griffin* found that the amendment was applicable and that it did not involve retroactive application since the purchase agreement was signed after the effective date of the amendment. The court then addressed the forest preserve's claim that it had a vested right in the land prior to the amendment by virtue of the passage of its acquisition resolution. The court rejected that claim by noting that "[e]ntering into negotiations for the purchase, and filing of a petition to condemn, vests no interest in land." *Griffin*, 112 Ill. App. 3d at 905. The court in *dicta* and without citation to authority then stated that, "[s]ince no taking occurs until the execution of a purchase agreement or conclusion of eminent domain proceedings, no rights to property are transferred until that date." *Griffin*, 112 Ill. App. 3d at 906. It is this statement that the instant plaintiffs rely on for their claim that a taking occurred when the parties in the present case executed the purchase contract.

We cannot accept the plaintiffs' reliance on this language as dispositive of the outcome here. The court seemed to mesh the issues of whether a taking had occurred with whether the forest preserve had a vested right in the property. Clearly a party would have a vested right in property upon obtaining a fully executed purchase agreement. However, it does not follow that the execution of a purchase agreement necessarily constitutes a taking. It is clear from the facts of *Griffin* that the court did not consider this precise issue.

We find *Patrick*, *Mattion*, and *Mills* persuasive and conclude that the trial court correctly determined that, since the parties agreed to the amount of compensation precluding the necessity of filing an eminent domain proceeding, no taking occurred. Accordingly, we hold that

the trial court properly granted the defendants' motions for summary judgment and properly denied the plaintiffs' cross-motion for summary judgment.

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed. Our resolution of the foregoing issue renders moot the remaining issues raised by the parties.

Affirmed.

GEIGER, P.J., and COLWELL, J., concur.

APPENDIX B

[Dated May 30, 1996]

STATE OF ILLINOIS
COUNTY OF LAKE—ss

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

No. 95 CH 501—Judge Peter Trobe

KLEINSCHMIDT INC., an Illinois, Corporation, et al.,

Plaintiffs,

v.

COUNTY OF COOK, body corporate and politic of the State of Illinois; et al.,

Defendants.

ORDER

The present matter before the Court concerns Motions for summary judgment of Defendants County of Cook ("Cook County"), County of Lake ("Lake County") and Corporate 500 Centre Phase I ("Corporate 500") against Plaintiffs Kleinschmidt, Inc. ("Kleinschmidt") and Harry Gaples. Also before the Court is Kleinschmidt's Partial Motion for Summary Judgment. The Court, having reviewed the proceedings of record in this case, finds as follows:

I. BACKGROUND

Plaintiffs Complaint arises out of improvements made to Lake-Cook Road involving land abutting the North side of Lake-Cook Road, east of the Milwaukee/Soo Line tracks. For purposes of summary judgment, the Court makes the following findings of fact.

By resolution of September 3, 1985, Cook County declared a plan to build an underpass on Lake-Cook Road beneath the Milwaukee/Soo railroad between Pfingsten Road to the west and Waukegan Road to the east.

Plaintiff Kleinschmidt, then a SCM (Smith Corona Merchant) division, owned a tract of land with 276 feet of frontage on the north side of Lake Cook Road, east of the railroad tracks, on the Lake County side of Lake-Cook Road. Matas Corporation, which owns Defendant Corporate 500, owned a 37 acre tract of land on the north side of Lake-Cook Road which lies between Plaintiffs' property and the railroad tracks.

The original highway project required the depression of Lake-Cook Road under the railroad tracks, and usage of Corporate 500's frontage in order to provide a right of way for a temporary bypass while a bridge is being built. The underpass plans effectively caused the elimination of Lake-Cook Road access to Corporate 500's private road, leaving it with access from Kates Road.

In February, 1985, in a meeting with Cook County Highway officials, Harry Gaples, President of Kleinschmidt was told that Cook County proposed to build an access road over Kleinschmidt's "front grass." At that meeting, Gaples stated that he was opposed to the access road being constructed on the Kleinschmidt property.

Subsequent to this meeting, representatives from Cook County approached Gaples several times in furtherance of the project. In November, 1985, Cook County wrote to Gaples, advising him of the plans for the grade separation project, and requesting permission to enter upon the Kleinschmidt property for surveying. In December, 1985, a Cook County road design consultant engineer called Gaples, advised him of the status of the project and again requested entry for survey. Gaples refused to permit entry for survey purposes.

In February, 1986, Cook County again wrote to Gaples, advising him that Cook County was going to proceed with the grade separation project under the railroad, and again requested permission to enter the Kleinschmidt property to conduct a survey. Later that month, Gaples wrote to Cook County requesting information about the purpose of condemning a portion of the Kleinschmidt property. Specifically, Gaples inquired "I wish to know the purpose being served by the condemnation, i.e. why do you need to condemn a portion of the Kleinschmidt property?"

Thereafter, in the Spring of 1986, Corporate 500 negotiated with Kleinschmidt for the purchase of property to build an access road. Corporate 500 had a meeting with Cook County on June 19, 1986, in which Corporate 500 stated that it was on the verge of acquiring the entire frontage from Kleinschmidt. However, on August 22, 1986, it was reported to Cook County that Plaintiffs were unwilling to sell the front of their property to Corporate 500. Subsequently, Gaples then purchased the Kleinschmidt land and buildings from SCM and formed Kleinschmidt, Inc. Gaples asserts that at that time, he was still actively resisting Cook County's surveyors request

to surveying the Plaintiffs land. As late as September, 1986, when Cook County surveyors entered upon the Kleinschmidt land, Gaples called the police, preventing them from completing the surveying.

In October, 1986, Gaples relented and allowed the surveyors on to his property, but requested that a 30 foot front yard be retained in front of his building. Cook County assured Gaples that it would not take more land than was needed.

In December, 1986, Harry Gaples wrote to Cook County objecting to the design of the access road across the Kleinschmidt property and proposed several alternatives. Gaples notes that in January, 1987, a meeting took place between members of the Cook County Highway Department and Gaples. At that meeting, Gaples was told that the County had absolute authority to "take" his land and that if he did not sell it to the county, the land was going to be condemned.

Several years later, in July, 1989, the County Board of Cook County passed an acquisition resolution declaring that a portion of the Kleinschmidt should "be taken" for construction and improvement.

Subsequently, Cook County retained an independent negotiator, Sheldon Perl, to negotiate the purchase price of a portion of the Kleinschmidt property. Perl met with Gaples in September, 1989, at which time Cook County made an offer of $575,000 for the Kleinschmidt frontage. At that meeting, Gaples was given a brochure describing Illinois Highways and Eminent Domain. Later that month, Gaples submitted a counter-offer of $615,000. This was rejected by Cook County, and Cook County submitted a counter-proposal of $580,000. Gaples rejected

this offer. After some further negotiation, and after Perl was replaced with another negotiator, Robert L. Snyderman, Cook County entered into an agreement to pay $600,000 for the Kleinschmidt frontage.

In 1994, Cook County was still in negotiation with Corporate 500 to acquire part of the front of its complex, together with construction easements. At that time, Corporate 500 offered to drop any claims, if Cook County would transfer title to Tract 21-04, formerly the Kleinschmidt frontage, so that Corporate 500 could landscape and maintain the property. On July 7, 1994, Cook County entered into a contract with Corporate 500, for the purchase of Tract 21-04.

As a result of the foregoing, Plaintiffs filed their two count Complaint for Declaratory Judgment and Other Relief. In Count I of their Complaint, Kleinschmidt and Gaples assert that there is a void "taking", as Cook County has effectively confiscated the Plaintiffs' frontage property and now seeks to convey it to a private party, Corporate 500. Also, Plaintiffs' complain that the Corporate 500 Defendants proposes to install "occlusive vegetation on Tract 24-01 [sic]." Pl. Comp. pa. 23. Count II of Plaintiffs' Complaint requests that this Court enjoin Cook County from delivering Tract 21-04 to the Corporate 500 Defendants and that this Court prohibit the Corporate 500 Defendants from doing any work including landscaping and vegetation on Tract 21-04.

II. DISCUSSION

A review of the record indicates that Motions for summary judgment of Cook County, Lake County and Cor-

porate 500 should be granted against Plaintiffs and that Plaintiffs Motion for Partial Summary Judgment be denied. Under Illinois law, where the interested parties agree to an amount of compensation, no taking of property by the government occurs. *Patrick Media Group v. DuPage Water Commission,* 258 Ill.App.3d 1068, 630 N.E.2d 958 (Ill.App.I Dist. 1994). As stated in *Patrick Media Group*:

> [i]t seems obvious that the taking or damaging of land by eminent domain is not accomplished by passing resolutions or ordinances, nor by negotiating with the owner for the purchase of it, or serving notices upon him that the land may be required for public purpose. The series of corporate actions by the [municipality], complained of, cannot be said to have had the same effect upon their land as the filing of a condemnation petition. Such could not, in any sense, be held to be the taking of land or damaging of land not taken.

Patrick Media Group, 258 Ill.App.3d 1068, 630 N.E.2d 958, 963 (III.App. I Dist. 1994). In *Patrick,* the First District indicates that there is no taking in the absence of condemnation proceedings. Given that the Plaintiffs negotiated and later entered into an agreement for the subject property prior to the institution of eminent domain proceedings, there is no taking. See also *Mills v. Forest Preserve District*, 345 Ill. 503, 178 N.E. 126 (Ill. 1931). This conclusion is in accordance with cases from other jurisdictions. See *Weintraub v. Flood Control District of Maricopa County,* 104 Ariz. 566, 456 P.2d. 936 (1969), *City of Brook Park v. Columbia Road Investment, Inc.*, 256 N.E.2d 254 (1970).

Therefore, it is hereby ordered that:

1) Motions for summary judgment brought by the County of Cook, County of Lake, Corporate 500 be granted against Plaintiffs on the issue of taking;

2) Plaintiffs Motion for Partial Summary Judgment be denied as to the issue of taking; and

3) This Order is final and appealable.

ENTER:

/s/ PETER TROBE
ASSOCIATE JUDGE

Dated in Waukegan, Illinois
this 30th day of May, 1996

APPENDIX C

[Filed July 20, 1995]

STATE OF ILLINOIS
COUNTY OF LAKE—ss

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

Gen. No. 95 CH 501

KLEINSCHMIDT INC., an Illinois corporation; BANK OF WAUKEGAN as Trustee under Trust Agreement dated Nov. 20, 1986 and known as Trust No.1898; and HARRY S. GAPLES,

Plaintiffs,

vs.

THE COUNTY OF COOK, a body corporate and politic of the State of Illinois; THE COUNTY OF LAKE, a body corporate and politic of the State of Illinois; AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO as Trustee under Trust Agreement dated 8/31/83 and known as Trust No. 59087; and CORPORATE 500 CENTRE PHASE 1, an Illinois Limited Partnership,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Now come KLEINSCHMIDT INC., an Illinois corporation; BANK OF WAUKEGAN as Trustee under Trust Agreement dated November 20, 1986 and known as

Trust No.1898; and HARRY S. GAPLES, plaintiffs herein, by MORRISON & MORRISON, their attorneys, and complaining of COUNTY OF COOK, a body corporate and politic of the State of Illinois; COUNTY OF LAKE, a body corporate and politic of the State of Illinois; AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO as Trustee under Trust Agreement dated 8/31/83 and known as Trust No. 59087; and CORPORATE 500 CENTRE PHASE 1, an Illinois Limited Partnership, state:

COUNT I
DECLARATORY JUDGMENT

1. Plaintiff BANK OF WAUKEGAN as Trustee under Trust Agreement dated November 20, 1986 and known as Trust No. 1898, on and prior to December 28, 1989, was legal owner of the real property located on the north side of Lake-Cook Road in the Village of Deerfield, Illinois, depicted in the plat of survey attached hereto as Exhibit A, and legally described as:

> The West 276.18 feet of the East 476.18 feet of the South 788.62 Feet (Except the South 50 feet thereof) of the South 1/2 of the Southwest 1/4 of Section 33, Township 43 North, Range 10 East of the Third Principal Meridian, in Lake County, Illinois.

2. Defendant AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO as Trustee under Trust Agreement dated 8/31/83 and known as Trust No. 59087, is the legal owner, and defendant CORPORATE 500 CENTRE PHASE 1, an Illinois Limited Partnership, is the beneficial owner, of a tract of land adjacent to and westerly of the land of the plaintiffs, depicted on Exhibit

B attached hereto, which was improved in about 1987 with an office complex known as "Corporate 500," which has access to the system of public roads via Lake-Cook Road on the South and Kates Road on the north.

3. Beginning in 1985, defendant COUNTY OF COOK commenced activities relating to the construction of a highway improvement on Lake-Cook Road in the nature of a railroad underpass, and advised the corporate predecessor of plaintiff KLEINSCHIMDT INC., that it was necessary to acquire the "front grass" of the Kleinschmidt property, which was eventually described as the north 217 feet of the south 267 feet of plaintiffs' property as hereinbefore described, denominated as Tract 21-04, and depicted on Exhibit A, attached hereto.

4. At that time, Kleinschmidt Division of SCM Corporation, through plaintiff HARRY S. GAPLES, its President, stated that it was opposed to the construction of the access road and was not willing to agree to sell this portion of its property.

5. While the Corporate 500 defendants were planning their office park and negotiating a planned unit development with the Village of Deerfield, they were aware of the plans of defendant COOK COUNTY to acquire the access of their property to Lake-Cook Road for the railroad underpass.

6. In 1986, defendant COUNTY OF COOK began negotiations with the corporate predecessor of plaintiff KLEINSCHMIDT INC. in an attempt to agree on the amount of compensation to be paid for the taking of Tract 21-04, pursuant to the Eminent Domain Act of the State of Illinois, and advised plaintiff HARRY S. GAPLES that Tract 21-04 would be acquired by defen-

dant COUNTY OF COOK regardless of the owner's consent or willingness to sell.

7. On December 15, 1986, Kleinschmidt Division of SCM Corporation was purchased by plaintiff KLEINSCHMIDT INC., an Illinois corporation, of which plaintiff HARRY S. GAPLES is a stockholder and President.

8. On or about September 12, 1989, defendant COUNTY OF COOK served upon plaintiffs a summary of right of way acquisition and offer to purchase said Tract 21-04 pursuant to the Eminent Domain Act and the Highway Code of the State of Illinois, a copy of which offer, including a plat depicting the taking, is attached hereto as Exhibit C.

9. The purpose of taking the land of the plaintiffs was to construct a public access road across Tract 21-04 to provide public access from Lake-Cook Road to a number of parcels of land in this area, including the Corporate 500 office complex and other properties northerly and easterly thereof, in addition to Corporate 500's access from Kates Road to the north.

10. Plaintiffs' property remaining after the conveyance of Tract 21-04 to defendant COUNTY OF COOK is improved with a one story brick office and computer service center building, occupied in part by the computer service business of the plaintiff, KLEINSCHMIDT INC. KLEINSCHMIDT INC. is also the owner of the beneficial interest in the property of plaintiffs described, and its President and Chief Operating Officer is plaintiff HARRY S. GAPLES.

11. KLEINSCHMIDT INC., is an electronic data interchange (EDI) value added network (VAN). An EDI VAN is a computer driven electronic post office for computer

processable messages, and KLEINSCHMIDT INC.'s provides services to various industries, which services are generally in operation twenty-four (24) hours each day, every day of the year.

12. The agreement of plaintiffs to convey Tract 21-04 to the COUNTY OF COOK was based on the representations of the COUNTY OF COOK that Tract 21-04 was required for public use, that a public road was to be constructed on Tract 21-04, that the remaining KLEINSCHMIDT INC. property would have public access via this new public road, and that Tract 21-04 and the road improvements thereon would be owned and maintained by the COUNTY OF COOK for the benefit of the public.

13. In consideration for plaintiffs' agreement to convey Tract 21-04 to THE COUNTY OF COOK, defendant, COUNTY OF COOK agreed to install traffic control signals at the intersection of the N.E. access drive on Tract 24-01 and the proposed Corporate 500 Access Road, stated on Exhibit D attached hereto. A plat showing the proposed configuration of these access drives and location of this traffic signal is attached hereto as Exhibit E.

14. On or about December 28, 1989, under threat of condemnation, and pursuant to negotiations and agreements of the parties, an agreement was entered into between plaintiffs and defendant COUNTY OF COOK whereby THE COUNTY OF COOK paid plaintiffs the sum of $600,000.00 and plaintiffs conveyed fee simple title to the aforesaid Tract 21-04 to defendant COUNTY OF LAKE, as nominee for defendant COUNTY OF COOK, by Trustee's deed recorded January 4, 1990 in the office of the Recorder of Deeds of Lake County Illinois, as Document No. 2866516, so that defendant

COUNTY OF COOK could construct and maintain a public access road.

15. Defendant COUNTY OF LAKE without the knowledge or agreement of plaintiffs, thereafter on June 30, 1994 conveyed Tract 21-04 to defendant COUNTY OF COOK by quit claim deed recorded in the office of the Recorder of Deeds of Lake County, Illinois, as Document No. 3562505.

16. Thereafter, on July 7, 1994, defendant COUNTY OF COOK entered into a written agreement with CORPORATE 500 CENTRE PHASE 1, recorded September 8, 1994 in the office of the Recorder of Deeds of Lake County, Illinois, as Document No. 3589611, by virtue of which plaintiffs' land (Tract 21-04) which was taken for public highway purposes was proposed to be conveyed in fee simple to CORPORATE 500 CENTRE PHASE 1 after roadway construction, subject only to public easements over the paved portions for public ingress and egress. A copy of this agreement is attached hereto as Exhibit F.

17. Plaintiffs were not a party to the aforesaid agreement between defendant COUNTY OF COOK and defendant CORPORATE 500 CENTRE PHASE 1, and have never consented to the transfer of their land to another private owner.

18. The agreement attached as Exhibit F requires defendants AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Trustee under Trust Agreement dated August 31, 1983 and known as Trust No. 59087 and CORPORATE 500 CENTRE PHASE I (hereinafter, "CORPORATE 500 DEFENDANTS") to convey an easement to the plaintiffs for ingress and egress, and defines the terms of that easement.

19. These terms of this proposed easement, as set forth in that agreement, including the indemnification condition, and restrictions on rights concerning utility service, are not acceptable to plaintiffs.

20. Plaintiffs first learned of the agreement referred to in paragraph 16 above, on or about April 18, 1995, when they were advised by Commonwealth Edison that COUNTY OF COOK and CORPORATE 500 Defendants had entered into an agreement to deed Tract 21-04 to CORPORATE 500 Defendants, and that under that agreement, COUNTY OF COOK could take no action without the approval of CORPORATE 500 Defendants.

21. Plaintiff GAPLES contacted COUNTY OF COOK and requested a copy of this agreement, but the COUNTY OF COOK refused to provide GAPLES with a copy of this agreement.

22. GAPLES himself obtained a copy of the agreement on or about May 1, 1995, and at that time learned that the access drive would now be private and the COUNTY OF COOK was not going to install traffic signals in violation of the agreement with the plaintiffs.

23. The CORPORATE 500 Defendants propose to install occlusive vegetation on Tract 24-01 which they anticipate receiving from defendant COUNTY OF COOK, in the area depicted on Exhibit G, attached hereto, and have applied to the Village of Deerfield, pursuant to the terms of their Planned Unit Development agreement, to permit the construction and installation of such occlusive vegetation.

24. This landscaping will be placed up to fifteen (15) feet from the front of the building of the plaintiffs, the stated purpose and effect of which will be to obscure the

view of plaintiffs building from Lake-Cook Road, and which will block the view, light and air from the windows of the offices in the front of plaintiffs' building which face Lake-Cook Road along the entire southerly exposure of plaintiffs' building.

25. The conveyance of Tract 21-04 made by the plaintiffs to the COUNTY OF LAKE, under the threat of condemnation, was for a public use, and such a conveyance to a public body is a "taking" of property under the Constitution of the United States and State of Illinois.

26. THE COUNTY OF COOK, as a creature of the State of Illinois, has only such land acquisition powers as is granted to it by the legislature of the State of Illinois, under 605 ILCS 5/5-801, pursuant to which the COUNTY OF COOK is granted the power to acquire properties for public roadways, including the power of eminent domain, but is not granted the power to sell, lease or convey properties so acquired, except in limited cases which are not applicable here.

27. THE COUNTY OF COOK does not have the statutory power to enter into the agreement described in paragraph 16 and attached hereto as Exhibit F.

28. The taking of the private property of the plaintiffs for the private ownership and use by the CORPORATE 500 DEFENDANTS is unconstitutional and in violation of the rights and privileges of the plaintiffs under the taking clause of the 5th Amendment of the Constitution of the United States, and the due process clause of the 14th Amendment to the Constitution of the United States, and also is in violation of Articles 2 and 15 of the Constitution of the State of Illinois of 1970.

29. The agreement between COUNTY OF COOK and CORPORATE 500 DEFENDANTS is null and void, since plaintiffs are a necessary party to any agreement which is contingent upon the granting of easement rights to the plaintiffs, the terms and conditions of which seek to impose legal obligations on the plaintiff.

30. The agreement between COUNTY OF COOK and CORPORATE 500 Defendants is in breach of the agreement between COUNTY OF COOK and plaintiffs, in that the traffic signals promised to plaintiffs by defendant COUNTY OF COOK can no longer be constructed, since the access drive will in the future be privately owned and maintained by the CORPORATE 500 Defendants.

31. There is an actual controversy between the parties hereto, and this action is brought pursuant to 735 ILCS 5/2-701.

WHEREFORE, plaintiffs pray that:

a. This Court declare the contract between COUNTY OF COOK and CORPORATE 500 Defendants, attached as Exhibit F, to be illegal, null and void.

b. This Court declare that the taking of the property of plaintiffs was for a private use and, therefore, void the taking of this land and order that Tract 21-04 be reconveyed to the plaintiffs, for which plaintiffs herewith tender the sum of $600,000.00 to be paid upon delivery of the deed of conveyance.

c. This Court require the COUNTY OF COOK and CORPORATE 500 Defendants to vacate the property of the plaintiffs known as Tract 21-04, to cease and desist from any further construction on Tract 21-04, to remove any and all construction materials and equipment there-

from, and to restore Tract 21-04 to the condition in which such premises were prior to the taking.

d. That plaintiffs recover from the defendants their costs, and that plaintiffs recover from the defendant COUNTY OF COOK their expenses and attorneys' fees because of the illegal, egregious, deliberate and unconstitutional conduct of defendant COUNTY OF COOK.

e. For such other relief as may be just and equitable under the facts and circumstances of this case.

COUNT II
INJUNCTION

1 - 30. Plaintiffs restate and reallege paragraphs 1 through 30 of Count I as paragraphs 1-30 of this Count II.

31. In May, 1995, the CORPORATE 500 Defendants received a purported "right of entry" from the COUNTY OF COOK, a copy of which is attached hereto as Exhibit H.

32. Construction of the access road has begun on Tract 21-04 by the COUNTY OF COOK and it is anticipated that this construction may be completed within the next thirty (30) to sixty (60) days.

33. The CORPORATE 500 Defendants have obtained approval of their landscaping plans from the Village of Deerfield, and have represented that they intend to commence fence construction and installation of occlusive vegetation upon completion of the access road by the COUNTY OF COOK.

34. Plaintiffs are informed and believe from the public statements of the representatives of the CORPORATE

500 Defendants that the deed to Tract 24-01 from COUNTY OF COOK to CORPORATE 500 Defendants is now in escrow and will be delivered to the CORPORATE 500 Defendants upon completion of the road by the COUNTY OF COOK.

35. If the deed from the COUNTY OF COOK to the CORPORATE 500 Defendants is delivered and the agreement between those parties is allowed to be consummated, the plaintiffs will suffer irreparable injury for which plaintiffs have no adequate remedy at law, in that:

a. Plaintiffs' property will have been taken for a private use.

b. The CORPORATE 500 Defendants will have ownership and authority over the access drive and the remainder of Tract 21-04.

c. Plaintiffs will be severely limited in their rights to install and maintain utilities across Tract 21-04, and their vehicular and pedestrian access will no longer be direct access from the system of public roads.

d. Installation by the CORPORATE 500 Defendants of the obstructive vegetation will block and obscure the light, air and view of the building of the plaintiffs, and will cause a material and substantial reduction in the market value of plaintiffs' building and remainder property.

e. The ingress and egress easement to be granted the plaintiffs from the CORPORATE 500 Defendants will impose liabilities on the plaintiff and other conditions which are not acceptable to plaintiffs nor agreed to by the plaintiffs.

f. The electric service which plaintiffs now enjoy may be interrupted and materially changed and impaired.

g. The traffic signal which is required under plaintiffs' agreement with the COUNTY OF COOK, attached hereto as Exhibit D, will not be installed.

36. A preliminary injunction is necessary to maintain the status quo.

WHEREFORE, plaintiffs pray that:

a. The Court enter a preliminary and permanent injunction prohibiting the COUNTY OF COOK from delivering the deed of Tract 21-04 to the CORPORATE 500 DEFENDANTS and prohibiting the COUNTY OF COOK and CORPORATE 500 DEFENDANTS from taking any further steps to close or consummate the agreement attached hereto as Exhibit H.

b. The Court enter a preliminary and permanent injunction prohibiting the CORPORATE 500 DEFENDANTS from doing any work, including, but not limited to, landscaping and installation of vegetation on Tract 21-04.

/s/ JOSEPH T. MORRISON
Attorney for Plaintiffs

MORRISON & MORRISON
Attorneys for Plaintiffs
32 N. West Street
Waukegan, Illinois 60085
708/244-2660

[Exhibits omitted in printing.]

APPENDIX D

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
83442 SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 1, 1997

Mr. Donald T. Morrison
Morrison & Morrison, P.C.
32 N. West St.
Waukegan, IL 60085

No. 83442 – Kleinschmidt Inc., et al., etc., petitioners, v. The County of Cook et al., etc., respondents. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 23, 1997.